Datuk Seri Mohd Shafie bin Hj Apdal v Datuk Mohd Ainal Hj Abdul Fattah

HIGH COURT (KOTA KINABALU) — SUIT NO BKI-22NCvC-31/4 OF 2018
CELESTINA STUEL GALID JC
25 JANUARY 2019

Civil Procedure — Default judgment — Assessment of damages — Plaintiff filed action premised on malicious prosecution against defendant — Judgment in default of defence entered against defendant — What was the resulting effect of judgment in default of defence to assessment of damages by plaintiff

Evidence — Hearsay — Affidavit — Affidavit deposed by plaintiff's counsel — Whether averments in affidavit amounted to hearsay, thus, inadmissible

Tort — Malicious prosecution — Proof of damage — Plaintiff filed action premised on malicious prosecution against defendant — Judgment in default of defence entered against defendant — Whether plaintiff proven general, exemplary and aggravated damages

The plaintiff sued the defendant for malicious prosecution from an earlier judicial review ('the JR') application taken by the defendant against the Malaysian Anti-Corruption Commission (MACC) and the plaintiff, which the JR was subsequently struck out. The plaintiff claimed that his reputation had been seriously harmed and seriously damaged and was also put to inconvenience and anxiety arising from it. The plaintiff was claiming for general, aggravated and exemplary damages. The plaintiff had obtained a judgment in default of defence against the defendant and the defendant did not apply to set aside the judgement in default. The plaintiff then proceeded to have the damages asses pursuant to the judgement in default of defence. The plaintiff did not lead any evidence at the hearing of the assessment of damages but only filed an affidavit ('encl 23') affirmed by learned counsel for the plaintiff and exhibiting the JR application and statement. The questions arose were: (a) what was the resulting effect of the judgment in default of defence to the assessment of damages by the plaintiff; (b) whether the plaintiff had proven the damages he claimed to have suffered; and (c) whether the averments in encl 23 amounted to hearsay and thus, inadmissible.

Held, granting RM300,000 in damages and costs subject to payment of allocatur fees:

(1) On the authority of the case of *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768, the plaintiff's pleaded case deemed accepted and proved by virtue of the judgment in default of defence. There was no application made to set aside the judgment in default of defence, the resulting effect of which was that the plaintiff's action was not challenged at all. That being the case, the court was bound to proceed with the assessment of damages and accordingly did so (see paras 14 & 17–18).

(2) The affidavit which was deposed by the plaintiff's counsel who stated the source of his information as being from his own personal knowledge as counsel in charge of the proceedings and from information derived from 'an examination of the documents, papers and files relating to the dispute' which were available to him. In addition, references were made in the affidavit to the court filed documents eg the JR application, statement and the judgment in default of defence, all of which this court was in any event, entitled to take judicial notice of. On that basis, the court was not persuaded by the contention by the learned counsel for the defendant that the averments in the said affidavit amounted to hearsay and therefore inadmissible (see paras 33–34).

(3) Much like in an action for defamation, damages arising from injury to one's reputation were claimable in an action for malicious prosecution. The plaintiff having led evidence that his reputation had been tarnished and given that the defendant had not led any evidence to rebut the assertion, the court was entitled to assess damages without any further proof of the said damages claimed for (see paras 38 & 42).

(4) Without any rebuttal from the defendant, there could only be one conclusion to the plaintiff's assertion ie that the JR application was indeed intended for a political mileage to benefit the defendant's party in the 14th General Election. The court therefore held that this was an appropriate case for the court to grant exemplary damages in favour of the plaintiff (see para 47).

(5) It had been averred in encl 23 that the defendant's conduct in filing the JR application and statement and causing them to be published in the newspaper before the 14th General Election had caused the plaintiff humiliation and anxiety. This was not challenged by the defendant at all. Of further significance was the fact that there was no evidence that the defendant attempted to or did tender an apology. On the contrary, the defendant had proceeded to oppose the assessment of damages. Based on the above, the plaintiff was entitled to claim for aggravated damages (see paras 50–52).

(6) In respect of general damages, exemplary damages and aggravated damages claimed by the plaintiff, the court was mindful of what Gopal

Sri Ram JCA (as he then was) had said in *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494 that runaway damages were to be discouraged. The court had also considered the amount of damages awarded by the courts in cases involving politicians. Taking all that into account, the court granted a global sum of RM300,000 to the plaintiff (see paras 53–55 & 57).

[Bahasa Malaysia summary

Plaintif telah menyaman defendan untuk pendakwaan niat jahat daripada satu permohonan semakan kehakiman yang terdahulu ('SK tersebut') yang diambil oleh defendan terhadap Suruhanjaya Pencegahan Rasuah Malaysia (SPRM) dan plaintif, yang mana SK tersebut telah kemudiannya dibatalkan. Plaintif menuntut bahawa reputasi beliau telah tercemar dan dirosakkan dan juga telah beliau telah disusahkan dan dicemaskan kerana tindakan defendan tersebut. Plaintif menuntut untuk ganti rugi umum, teladan dan teruk. Plaintif telah mendapat penghakiman ingkar pembelaan terhadap defendan dan defendan tidak memohon untuk mengetepikan penghakiman ingkar tersebut. Plaintif kemudiannya terus memohon untuk taksiran ganti rugi untuk penghakiman ingkar pembelaan tersebut. Plaintif tidak mengemukakan apa-apa keterangan sewaktu pendengaran penaksiran ganti rugi tersebut tetapi hanya memfailkan satu afidavit (lampiran 23) yang diikrarkan oleh peguam terpelajar untuk plaintif dan mengekshibitkan permohonan SK tersebut dan pengataan. Persoalan yang timbul adalah: (a) apakah kesan penghakiman ingkar pembelaan kepada penaksiran ganti rugi oleh plaintif; (b) sama ada plaintif telah membuktikan kerugian yang dikatakan dialami; dan (c) sama ada pengataan dalam lampiran 23 terjumlah kepada dengar cakap dan oleh demikian, tidak boleh diterima.

Diputuskan, membenarkan RM300,000 ganti rugi dan kos tertakluk kepada pembayaran alokatur:

(1) Atas otoriti kes *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768, kes plaintif yang diplid adalah dianggap sebagai diterima dan dibuktikan berdasarkan penghakiman ingkar pembelaan. Tiada permohonan dibuat untuk mengetpikan penghakiman ingkar pembelaan, yang mana kesannya adalah bahawa tindakan plaintif tidak dicabar langsung. Oleh yang demikian, mahkamah terikat untuk meneruskan dengan penaksiran kerugian telah berbuat sedemikian (lihat perenggan 14 & 17–18).

(2) Afidavit yang dideposkan oleh peguam plaintif yang menyatakan sumber maklumatnya adalah daripada pengetahuan peribadinya dan sebagai peguam yang mengendalikan prosiding dan dari maklumat yang diperoleh daripada 'penelitian dokumen, kertas dan fail berkaitan dengan pertelingkahan' yang ada padanya. Tambahan lagi, rujukan yang dibuat dalam afidavit kepada dokumen yang difailkan kepada mahkamah

contohnya permohonan SK, penyataan dan penghakiman ingkar pembelaan, yang mana semuanya mahkamah berhak untuk mengambil pengiktirafan penghakiman. Atas alasan tersebut, mahkamah tidak dipujuk oleh hujahan peguam defendan terpelajar bahawa pengataan dalam afidavit tersebut terjumlah kepada dengar kata dan oleh itu, tidak boleh diterima (lihat perenggan 33–34).

(3) Sama seperti tindakan kerana fitnah, kerugian yang timbul daripada kerosakan kepada reputasi seseorang boleh dituntut dalam tindakan pendakwaan niat jahat. Plaintif setelah mengemukakan keterangan bahawa reputasinya telah tercemar dan mengambilkira fakta yang defendan tidak mengemukakan apa-apa keterangan untuk mematahkan pengataan tersebut, mahkamah berhak untuk menaksir kerugian tanpa apa-apa bukti lanjut untuk kerugian yang dituntut (lihat perenggan 38 & 42).

(4) Tanpa apa-apa pematahan daripada defendan, hanya akan ada satu kesimpulan kepada pengatataan plaintif iaitu bahawa permohonan SK tersebut adlaah bertujuan untuk kepentingan politik untuk menguntungkan parti defendan dalam Pilihanraya Umum ke-14. Mahkamah oleh itu, memutuskan bahawa ini adalah kes yang sesuai untuk mahkamah membenarkan ganti rugi teladan kepada plaintif (lihat perenggan 47).

(5) Ianya diikrarkan dalam lampiran 23 bahawa pelakuan defendan dalam memfailkan permohonan SK dan penyataan dan menyebabkan ianya diterbitkan dalam surat khabar sebelum Pilihanraya Umum ke-14 telah menyebabkan plaintif malu dan cemas. Ianya tidak dicabar oleh defendan langsung. Adalah juga signifikan fakta bahawa tiada keterangan bahawa defendan cuba atau telah mengemukakan satu permohonan minta maaf. Sebaliknya, defendan telah meneruskan untuk menentang penaksiran ganti rugi. Berdasarkan perkara diatas, plaintif berhak untuk menuntut ganti rugi teruk (lihat perenggan 50–52).

(6) Berkaitan dengan ganti rugi umum, ganti rugi telahdan dan ganti rugi teruk yang dituntut oleh plaintif, mahkamah sedar akan apa Gopal Sri Ram JCA (sepertimana beliau pada waktu tu) telah memutuskan dalam *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494 bahawa ganti rugi *runaway* perlu ditegah. Mahkamah juga telah menimbangkan amaun ganti rugi yang diawadkan oleh mahkamah dalam kes yang melibatkan ahli politik. Mengambil kira semua perkara tersebut, mahkamah mengawadkan satu jumlah menyeluruh RM300,000 kepada plaintif (lihat perenggan 53–55 & 57).]

Notes

For cases on default judgment in general, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3311–3359.

For cases on affidavit, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2156–2159.
For cases on proof of damage, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1069–1070.

Cases referred to

Chin Choon @ Chin Tee Fut v Chua Jui Meng [2005] 3 MLJ 494, CA (consd)
Chong Siew Chiang v Chua Ching Geh & Anor [1995] 1 MLJ 551, HC (refd)
Chong Siew Chiang v Ng Kim Ho and Anor [2010] MLJU 639; [2011] 1 MLRH 188, HC (folld)
Dato' Dr Tan Chee Khuan v Chin Choong Seng @ Victor Chin [2011] 8 MLJ 608; [2010] 3 MLRH 723, HC (refd)
Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor [2010] 2 MLJ 492; [2009] 4 MLRH 48, HC (refd)
Dato' Ahmad Rejal Arbee & Anor v YB Mahfuz Omar [2015] 3 MLRA 529 (refd)
Datuk Harris Mohd Salleh v Datuk Mohd Shafie Hj Apdal & Ors [2009] 7 MLJ 371; [2008] 3 MLRH 527, HC (refd)
Datuk Harris Mohd Salleh v Datuk Yong Teck Lee (sued in his personal capacity and as an officer of the second respondent) & Anor [2017] 6 MLJ 133; [2017] 6 MLRA 281, FC (refd)
Datuk Harris bin Mohamed Salleh v Abdul Jalil bin Ahmad & Anor [1984] 1 MLJ 97; [1983] 1 MLRH 92 (refd)
Gasing Heights Sdn Bhd v Aloyah Bte Abd Rahman & Ors [1996] 3 MLJ 259, HC (refd)
Haji Ahmad v Sadah (F) [1954] 1 MLJ 101 (refd)
KHK Advertising Sdn Bhd v Siera Management Sdn Bhd (in liquidation) [2018] 4 MLJ 168, CA (refd)
Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768, FC (refd)
Lim Guan Eng v Utusan Melayu (M) Bhd [2012] 2 MLJ 394; [2012] 3 MLRH 124, HC (refd)
Lim Tze Sian v Coverright Surface Malaysia Sdn Bhd [2017] 1 MLJ 418, CA (refd)
Majlis Amanah Rakyat & Anor v Mat Nawi bin Awang and another appeal [2017] 1 MLJ 500, CA (refd)
Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin Bin Ungku Mohamed [1998] 2 MLJ 425, CA (refd)
Manley v Metropolitan Police Commissioner [2006] All ER (D) 317 (Jun); [2006] EWCA Civ 879, CA (refd)
Rookes v Barnard [1964] 1 All ER 367; [1964] AC 1129, HL (refd)
Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784, CA (refd)
Tan Chong & Son Motor Co Sdn Bhd v Borneo Motors (M) Sdn Bhd & Anor [2001] 3 MLJ 140; [2001] 3 AMR 3789, HC (refd)

A *Thompson v Commissioner of Police of the Metropolis; Hsu v Commissioner of Police of the Metropolis* [1997] 2 All ER 762; [1997] EWCA Civ 3083; [1998] QB 498, CA (refd)
YB Dato' Dr Hasan bin Mohamed Ali lwn YB Mulia Tengku Putra bin Tengku Awang dan lain-lain [2010] 8 MLJ 269; [2009] 4 MLRH 421, HC (refd)

B **Legislation referred to**

Election Offences Act 1954 s 10, 10(a), (b), (c), (d), (e), (f), (g), (h), (i)
Rules of Court 2012

C *Douglas Lind (Lind Willie Wong & Chin) for the plaintiff.*
Nurul Rafeeqa (Nurul Rafeeqa Marcel) for the defendant.

Celestina Stuel Galid JC:

D INTRODUCTION

The parties

E **[1]** The plaintiff is the President of Parti Warisan Sabah and had been a Member of Parliament for the District of Semporna, Sabah for five terms since 1994 and the last being before Parliament was dissolved to pave way for the 14th General Election.

F **[2]** At the time of hearing of the assessment of damages on 31 October 2018 the 14th General Election, which was held on 9 May 2018 had been concluded and the plaintiff was subsequently sworn in as the Chief Minister of Sabah on 12 May 2018.

G **[3]** The plaintiff was also previously a vice-president of the United Malay National Organisation ('UMNO') until early 2016 during which time and while being a Member of Parliament, had also held several ministerial positions in the Federal Cabinet.

H **[4]** In addition, the plaintiff was also the Chairman of the Commonwealth Association based at Westminster London, United Kingdom from 2008–2011.

I **[5]** The defendant is admitted as an advocate of the High Court in Sabah and Sarawak and is also a politician and member of UMNO.

The plaintiff's suit

[6] By this action, the plaintiff sued the defendant for malicious prosecution

arising from an earlier judicial review application taken out by the defendant against the Suruhanjaya Pilihan Raya Malaysia ('SPRM') as the first respondent and the plaintiff as the second respondent in Application for Judicial Review No BKI-13NCvC-5/4 of 2018 ('the JR application') on 17 April 2018.

[7] The JR application was struck out by the court on 7 May 2018. However, according to the plaintiff, his reputation had been harmed and seriously damaged and was also put to inconvenience and anxiety arising from it.

[8] It was the plaintiff's case that the defendant had filed the JR application in anticipation of the 14th General Election and that in his statement in support of the JR application, the defendant had made numerous allegations attacking the plaintiff's character and moral standing by alleging that the plaintiff had committed massive fraud of having siphoned off RM1.5 billion out of the RM7.5 billion that was allocated to the Ministry of Rural and Regional Development while the plaintiff was its minister. It was further alleged by the defendant in the JR application that the plaintiff had taken these funds which were meant to provide basic facilities such as water electricity road repairs and food for the poor in the rural areas.

[9] By this suit, the plaintiff claimed for general, aggravated and exemplary damages from the defendant.

[10] On 26 July 2018, the plaintiff obtained a judgment in default of defence against the defendant. Although duly represented by counsel and for reasons best known to them, the defendant's counsel did not apply to set aside the judgment in default.

The assessment of damages

[11] The plaintiff proceeded to have the damages assessed pursuant to the judgment in default of defence dated 26 July 2018.

[12] As alluded to above, there was no application made by the learned counsel for the defendant to have the judgment in default of defence set aside. A relevant question, which arises is this — what is the resulting effect of the judgment in default of defence to the assessment of damages by the plaintiff?

[13] The answer is found in the decision by the Federal Court in the case of *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768, wherein Jeffrey Tan FCJ had this to say about default judgments and allegations which are not defended:

A [9] By that, the trial court clearly held that fraud had been made out against the first to fourth respondents and so needed not to be proved. Indeed, when the first to fourth respondents failed to defend the claim, it should be assumed that the appellants had made out fraud against the first to fourth respondents. It would be against all good sense and logic, quixotic in fact, to hold that an allegation, although B unanswered, must yet be proved. In *Datuk Patinggi Abdul Rahman Ya'kub v Abang Mohammad bin Abang Anding* [1979] 2 MLJ 185, where the plaintiff, who had obtained interlocutory judgment in default, applied for assessment of damages, Seah J, as he then was, duly assumed that all allegations in the statement of claim were deemed as proved:

C > In assessing damages in this case, the court is placed in a predicament in that no evidence was given either by the plaintiff or the defendant. *It follows that damages should therefore be assessed on the basis of the pleadings contained in the statement of claim. For the purpose of assessing damages in this case I would assume that all the allegations in the statement of claim are deemed to have been proved*. (Emphasis D added.)

[14] On the authority of the case of *Kamarulzaman bin Omar*, the plaintiff's pleaded case deemed accepted and proved by virtue of the judgment in default of defence is as follows:

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(a) the plaintiff is the President of Parti Warisan Sabah and had been a Member of Parliament for the District of Semporna, Sabah for five terms since 1994 and the last being before Parliament was dissolved to pave way for the 14 General Election;

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(b) the plaintiff was also previously a vice-president of the United Malay National Organisation (UMNO) until early 2016 during which time and while being a Member of Parliament, had also held several ministerial positions in the Federal Cabinet;

G (c) in addition, the plaintiff was also the Chairman of the Commonwealth Association based at Westminster London, United Kingdom from 2008–2011;

(d) the defendant is admitted as an advocate of the High Court in Sabah and Sarawak and is also a politician and member of UMNO;

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(e) although the JR application was struck out by the court on 7 May 2018, the plaintiff's reputation has been harmed and seriously damaged and was also put to inconvenience and anxiety arising from it;

I (f) the defendant's action in filing the JR application was not bona fide but was intended to maliciously tarnish and damage the reputation of the plaintiff, in order to gain political mileage for his political party, UMNO;

(g) the defendant was fully aware that the plaintiff had not been charged or convicted for any of the alleged corrupt practices but the defendant made

the allegations in his JR application to inflict the maximum damage to the plaintiff's good reputation for political gain;

(h) the defendant also referred to s 10(a)–(i) of the Election Offences Act 1954 suggesting that the plaintiff was guilty of unlawful acts including bribery during the 14th General Election;

(i) in addition, the defendant caused the full details of the JR application together with his statement in particular the alleged corrupt practices in all the leading newspapers in Sabah, in English, Malay and Chinese languages; and

(j) all of the defendant's actions were calculated to inflict the maximum damage and harm to the plaintiff's reputation before the 14th General Election.

[15] Before leaving this point, I must state here that I am aware that except for cases involving bankruptcy, winding up and in relation to criminal malicious prosecution, there are scarcely any no reported cases where the court had allowed claims for civil malicious prosecution. In fact, the reported cases seem to suggest that the courts doubted the existence of a tort of malicious prosecution of civil proceedings — see *Gasing Heights Sdn Bhd v Aloyah Bte Abd Rahman & Ors* [1996] 3 MLJ 259 and *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin Bin Ungku Mohamed* [1998] 2 MLJ 425.

[16] In the recent Court of Appeal case of *KHK Advertising Sdn Bhd v Siera Management Sdn Bhd (in liquidation)* [2018] 4 MLJ 168, Alizatul Khair JCA (now FCJ) indicated as much when Her Ladyship, inter alia, held:

> [75] In this regard the reliance by the learned judge on the case of *Tims v John Lewis* to support her finding that the material date (of assessment) is the date of the order of winding up was granted is with due respect, erroneous as *Tims* concerns a claim for criminal malicious prosecution arising from the (allegedly) wrongful imprisonment of the plaintiffs in respect of a charge which was subsequently withdrawn. The case before us relates to the malicious prosecution of a winding up petition.
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> [76] Similarly with the case of *Govindii* which was referred to by learned counsel for the plaintiff in his submission. It concerns a claim for criminal malicious prosecution.
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> [77] *It is important to bear in mind that as confirmed by the case of Gregory the tort of malicious prosecution was only extended to the civil context in special cases. The House of Lords in Gregory stressed that it was undesirable and unnecessary to extend the established circumstances of malicious prosecution as any apparent injustice arising from any unwarranted civil proceeding are either already sufficiently protected under other torts or capable of being addressed by any unnecessary and desirable extensions of the torts.* (Emphasis added.)

[17] Had the defendant defended the plaintiff's claim, it would have been incumbent upon this court to determine whether the plaintiff's claim for the tort of civil malicious prosecution was sustainable having regard to the decided cases referred to above. However, as indicated earlier, for best reasons known to the defendant and/ or his counsel, there was no application made to set aside the judgment in default of defence, the resulting effect of which was that the plaintiff's action was not challenged at all.

[18] That being the case, this court was bound to proceed with the assessment of damages and accordingly did so.

The plaintiff's contentions

[19] The plaintiff did not lead any evidence at the hearing of the assessment of damages but only filed an affidavit (encl 23) affirmed by the learned counsel for the plaintiff and exhibiting the JR application and statement (exhs 'DL2' and 'DL3' respectively). It was averred in the said affidavit that by the defendant's statement filed in the JR application, he had caused serious damage to the reputation and good name of the plaintiff.

[20] It was further averred that the defendant had deliberately caused to be published the JR application and statement in all the local and national newspapers and the electronic media within Malaysia with the ulterior intention to influence the outcome of the then pending 14th General Election in favour of UMNO.

[21] Apart from citing s 10 of the Election Offences Act 1954 which provision deemed the persons described thereunder as being guilty of the offence of bribery, the defendant also in the statement, purported to quote newspaper reports on the arrest and investigation by the Malaysian Anti-Corruption Commission ('MACC') into the plaintiff.

[22] Based on those reports, the defendant made his own conclusion in the statement as follows:

> (19) From the foregoing newspaper reports the 2nd Respondent is accused of massive fraud during his time with the Government of Malaysia and his tenure as a Federal Minister. He had abused his position to privately amass a huge treasure chest of funds amounting to at least RM7,000,000.00. The contractual obligations entered into by the Ministry when the 2nd Respondent was the Minister are invalid ab initio in that its conclusion amounts to conduct that does not comply when an organ of state contracts for goods or services for it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.
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> (20) The action of the 2nd Respondent involve unprecedented constitutional violations that have injured and have caused continuing injury to the citizenry of

Sabah and Malaysia and the residents of the District of Semporna and the State of Sabah. The actions of the 2nd Respondent while serving as a Minister in the Ministry shows that he has not faithfully served the interests of the people of Malaysia and in particular the people of the State of Sabah and the citizens of the District of Semporna despite being bound by oath to faithfully execute his office and to preserve, protect and defend the Federal Constitution and serve the Yang DiPertuan Agong and the Prime Minister a full Minister in the Federal Cabinet. The Defendant has not acted in the best interest of the people of Sabah but instead for his own interests and or personal enrichment inflicting untold harm of the Malaysian democratic system of government and endangering the rule of law.

(21) The financial violations committed by the 2nd Respondent undermine the trust that the Malaysia people and the citizens of Sabah are entitled to have in the Government of Malaysia. It is fundamental to the system of Government in Malaysia that the elected representative such as the 2nd Respondent always act in the singular pursuit of the liberty, security, health and well being of the people of Sabah all of which were abandoned in the financial scandal involving the Ministry of the 2nd Respondent. The violations committed by the 2nd Respondent has damaged and harmed the economy of the State of Sabah and has caused financial harm to the people of Sabah by unlawfully depriving them economic development. The 2nd Respondent violations violently offend the sacred principles that the Government is or ought to be instituted for the common benefit, protection and security and not for the particular emolument or advantage of any particular man, family or set of men.

(22) The violations committed by the 2nd Respondent implied that the 2nd Respondent used his clout in the Ministry and as the Minister to extract from government whether lawfully or unlawfully maximum concessions, waivers, exemptions and variances in respect of requirements imposed by the law and in consequence thereof the Applicant including the people of Sabah would and have suffered the consequences including but not limited to lost revenue and comprised enforcement of laws including laws on the protection of the environment and land use regulation.

(23) The financial loss of the Ministry and the missing funds have on the balance of probabilities been used by the 2nd Respondent in contravention and in breach of Section 10 of the Election Offences Act 1954. In the premised the 2nd Respondent is not a fit and proper person to be an elector or voter or be elected at any election including the 14th General Election.

[23] It was submitted by the learned counsel for the plaintiff that as there was no dispute in the plaintiff's claim that the defendant's action had gravely damaged the good name and reputation of the plaintiff, there was no requirement for the plaintiff to lead any evidence and that the issue was only as to the quantum to be decided by the court. In this case, learned counsel has submitted that the sum of RM1.3m comprising of RM300,000, RM500,000 and RM500,000 as general damages, exemplary damages and aggravated damages respectively was appropriate.

[24] In support of his submission on the quantum claimed, learned counsel for the plaintiff cited the case of *Chong Siew Chiang v Chua Ching Geh & Anor* [1995] 1 MLJ 551, where Richard Malanjum J (now CJ of Malaysia), said:

> In dealing with the quantum of damages to be paid, I am of the opinion that this court is entitled to consider the award of previous cases by the courts of this country. But the paramount consideration is that any award to be given should be viewed as compensation to the plaintiff for the harm to his reputation and feeling.

[25] Reference was also made to the following commentary by the authors *Clerk & Lindsell on Torts* (20th Ed) at para 16–04 said:

> An abuse of the right to institute proceedings may of necessity be injurious, involving damage to character, or it may in any particular case bring about damage to persons or property. There are according to Holt CJ, 3 sorts of damage to a claimant, any one of which is sufficient to support an action for malicious prosecution:
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> > First, damage to his fame if the matter whereof he be accused be scandalous. Secondly, to his person, whereby he is imprisoned. Thirdly, to his property, whereby he is put to charges and expenses.

[26] The learned authors continued at para 16-05 citing the case of *Manley v Metropolitan Police Commissioner* [2006] All ER (D) 317 (Jun); [2006] EWCA Civ 879, wherein the Court of Appeal endorsed the statement by Roch LJ in *Thompson v Commissioner of Police of the Metropolis; Hsu v Commissioner of Police of the Metropolis* [1997] 2 All ER 762; [1998] QB 498 setting out the three heads of compensation for malicious prosecution, but advised caution in the balance between them:

> Compensation for malicious prosecution has three aspects. First, there is the damage to a person's reputation. The extent of that damage will depend upon the claimant's actual reputation and upon the gravity of the offence for which he has been maliciously prosecuted. The second aspect is the damage suffered by being put in danger of losing one's liberty or of losing property. Compensation is recoverable in respect of the risk of conviction. *McGregor on Damages* 16th Edition paragraph 1862 considers that an award under this head is basically for injury to feelings, unless there has been a conviction followed by imprisonment. The third aspect is pecuniary loss caused by the cost of defending the charge.

[27] Learned counsel for the plaintiff referred to the following cases as guidelines on the amount of damages to be awarded:

(a) claim by a politician, Nik Nazmi Nik Ahmad against the government and the former Attorney General Tan Sri Ghani Patel for malicious prosecution (as reported in *The Star Online* dated 26 December 2017) — the court awarded RM100,000 in general damages, RM80,000 in special damages and RM50,000 in exemplary damages;

(b) in the defamation case of *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494 — the court awarded a global sum of RM200,000 for compensatory, aggravated and exemplary damages;

(c) in the defamation case of *Tan Chong & Son Motor Co Sdn Bhd v Borneo Motors (M) Sdn Bhd & Anor* [2001] 3 MLJ 140; [2001] 3 AMR 3789 — the court awarded RM500,000 for libel and another RM500,000 for injurious falsehood; and

(d) *Thompson v Commissioner of Police of the Metropolis; Hsu v Commissioner of Police of the Metropolis* [1997] 2 All ER 762; [1997] EWCA Civ 3083, a case on malicious prosecution — Pound Sterling 51,500 (or RM272,950) and Pound Sterling 35,000 (or RM185,500) as compensatory, aggravated and exemplary damages.

The defendant's contentions

[28] The defendant also did not lead evidence at the hearing of the assessment of damages. In fact, although given time to, learned counsel for the defendant did not file any written submission but only submitted orally. The gist of the submission was that the plaintiff had not brought any evidence to show the damages being claimed and that the affidavit affirmed by the learned counsel for the plaintiff (encl 23) amounted to hearsay.

[29] In addition, learned counsel for the defendant cited the case of *Lim Tze Sian v Coverright Surface Malaysia Sdn Bhd* [2017] 1 MLJ 418 wherein one of the issues was whether the respondent did not in fact properly prove the quantum claimed of RM1m.

[30] The assessment of damages in *Lim Tze Sian*, was made pursuant to an interlocutory judgment entered for the respondent's counterclaim after the appellant's suit was struck out due to his repeated non-attendance. The Court of Appeal set aside the order of the High Court affirming the damages awarded by the senior assistant registrar, inter alia, holding that:

> (2) Unless admitted, or unless the claim was for liquidated damages where the judgment entered was a final judgment, the respondent was still obliged to prove its loss. Section 74 of the Contracts Act 1950 requires the respondent to prove that it had suffered loss of profits as a result of the appellant's breach of the agreement. The respondent was also required to prove that the losses sustained were caused by the appellant. The burden of proving this loss of profits always remained with the respondent. Until the respondent had discharged the burden, there was no issue of rebuttal by the appellant. There was no evidence in either the learned SAR's decision or that of the learned judge that these fundamental principles had been duly considered, hence, the court was justified in interfering so as to do justice.

This court's decision

[31] I will first deal with the issue of the affidavit affirmed by the learned counsel for the plaintiff (encl 23) and whether the averments therein amount to hearsay and thus, inadmissible.

[32] In the case of *Lim Tze Sian*, cited by the learned counsel for the defendant, the court, inter alia, observed that affidavits may be used at trial but in accordance with the relevant provisions under the Rules of Court 2012 and that it was always open to either of the parties to apply to cross-examine the deponent in the event there was disbelief and basis for such disbelief in the truth of the contents of the affidavit filed. Further, the court stated that affidavit evidence may contain admissible hearsay in that the source of the evidence must be disclosed and the deponent must express his belief in its truth.

[33] In the present case, the affidavit (encl 23), although not deposed by the plaintiff himself, was deposed by his counsel who stated the source of his information as being from his own personal knowledge as counsel in charge of the proceedings and from information derived from 'an examination of the documents, papers and files relating to the dispute' which were available to him. In addition, references were made in the affidavit to the court filed documents eg the JR application, statement and the judgment in default of defence, all of which this court was in any event, entitled to take judicial notice of.

[34] On that basis, I was not persuaded by the contention by the learned counsel for the defendant that the averments in the said affidavit amounted to hearsay and therefore inadmissible. Also, as noted in the case of *Lim Tze Sian*, it was open for the defendant to apply to cross-examine the deponent of the said affidavit. However, there was no such application for cross-examination in the present case and neither did the defendant file any affidavit to respond to the plaintiff's affidavit. Thus, there was no actual challenge to the plaintiff's evidence as per the averments in the said affidavit.

[35] Now, as to whether the plaintiff has proven the damages he claimed to have suffered.

General damages

[36] In summary, the unchallenged evidence of the plaintiff is this — that due to his position (as enumerated in the statement of claim), he has a certain standing in the society, which was harmed by the defendant's allegations in the JR application and statement. The plaintiff said that the defendant had caused serious damage to his reputation and good name. Further, it was averred that

the defendant had calculated his actions in anticipation of the impeding 14th General Election. A

[37] In the case of *Haji Ahmad v Sadah (F)* [1954] 1 MLJ 101, Spenser Wilkinson J held that: B

> It was common that maintenance proceedings although criminal in form are civil proceedings in substance. It has been laid down that in order to support an action for malicious proceedings it is necessary to prove damage and that there are three sorts of damage, any one of which is sufficient to support the action. *The first is damage to a man's fame*; the second is damage to his person; and the third is damage to his property; and the action is maintainable if, and only if, if falls within one or other of those three heads (per Buckley LJ in *Wiffen v Bailey* and *Remford Urban Council* citing the judgment of Lord Holt CJ in *Savile v Roberts*. (Emphasis added.) C

[38] Much like in an action for defamation, damages arising from injury to one's reputation are claimable in an action for malicious prosecution. Although not explicit, this may be discerned from the decision of the Court of Appeal in the case of *Majlis Amanah Rakyat & Anor v Mat Nawi bin Awang and another appeal* [2017] 1 MLJ 500. D

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[39] In that case, the respondent obtained a judgment in default of defence of his claim against the appellant for, inter alia, malicious prosecution. The respondent claimed that the appellants had unlawfully caused him to be adjudicated a bankrupt on 28 August 1999, which resulted in his business being completely ruined and resulted in some of his properties being auctioned off. The respondent claimed for damages including for: (a) loss of profit; (b) injury to his reputation and business; (c) exemplary damages; (d) special damages; and (e) aggravated damages. F

[40] The Court of Appeal allowed the cross-appeal by the respondent and, inter alia, enhanced the damages for injury to reputation from RM50,000 to RM100,000. In discussing on this head of claim, the Court of Appeal had this to say: G

> [21] The respondent's bankruptcy status was published and circulated in the media or public documents, namely exhs P11, P12, P13, P15, P16, P17, P18, P19, P20, P27, P28 and P29. The respondent's standing was badly tainted and tarnished for being adjudged a bankrupt. *The Defamation Act 1957 viewed defamation against a man's profession or business as very serious, which requires no proof of special damage: see s 5.* In the case of *YB Dato' Paduka Husam Musa v YB Dato' Nozula Mat Diah & Ors (No 2)* [2014] 1 LNS 1411, the award allowed was RM350,000. (Emphasis added.) H I

[41] It can be seen from the judgment of the Court of Appeal that although not part of the pleaded cause of action, when assessing damages for injury to

reputation, the court may have regard to the principles relating to defamation cases. In this case, the Court of Appeal took the view that as with claims for defamation, there was no need to prove special damages when assessing damages for injury to reputation.

[42] Likewise, in the present case, I find merits in the submission by the learned counsel for the plaintiff that having led evidence that his reputation had been tarnished and given that the defendant had not led any evidence to rebut the assertion, the court is entitled to assess damages without any further proof of the said damages claimed for. This is contrary to the contentions by the learned counsel for the defendant that the plaintiff had not proven that he had suffered damages.

Exemplary damages

[43] The starting point in a discussion on the principles applicable to the grant of exemplary damages is the oft-quoted case of *Rookes v Barnard* [1964] 1 All ER 367; [1964] AC 1129 where Lord Devlin laid down the following three categories in which exemplary damages may be recoverable:

(a) cases of oppressive, arbitrary, or unconstitutional action by servants of the government;

(b) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff; and

(c) cases where exemplary damages are expressly authorised by statute.

[44] Lord Devlin explained the second category further by adding that:

> Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. I have quoted the dictum of Erie CJ, in *Bell v Midland Ry Co* (1861) 10 CBNS at p 304. Maule J, in *Williams v Currie* (1845) 1 CB at p 848, suggests the same thing; and so does Martin B, in an obiter dictum on *Crouch v Great Northern Ry Co* (1856) 11 Exch 742 at p 759. It is a factor also that is taken into account in damages for libel; *one man should not be allowed to sell another man's reputation for profit. Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object — perhaps some property which he covets — which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay*. (Emphasis added.)

[45] The plaintiff had averred that the defendant's action in filing the JR application was clearly intended to maliciously tarnish and damage the reputation of the plaintiff, in order to gain political mileage for his party UMNO for the purpose of the upcoming 14th General Election. This averment was not disputed by the defendant. In addition, it is of significance that the defendant did not even appeal against the striking out of the JR application.

[46] The courts have recognised that exemplary damages are appropriate in such circumstances. In the case of *Chin Choon @ Chin Tee Fut v Chua Jui Meng*, the appellant alleged that the respondent who was the then deputy minister for International Trade and Industry, had acted corruptly in the discharge of his duties. The appellant made the claims in a press conference called by the appellant and the story was carried by two Chinese newspapers. In addition, the appellant repeated the defamatory words to three or four journalists outside of the Anti Corruption Agency where he had gone to lodge a report and where he said that he had 'boxes of evidence' against the respondent. Gopal Sri Ram JCA (as he then was) stated that:

> [12] With respect, we do not think it a fair interpretation of Lord Devlin's speech when read as a whole that he intended that grant of punitive or exemplary damages to be limited to cases of monetary profit. That is too narrow an interpretation. In our judgment, any form of advantage gained by a defendant in a defamation case suffices. It need not produce an immediate profit in money terms as happened in *Dato' Musa bin Hitam v SH Alatas & Ors*. It may produce an immediate non-pecuniary advantage that may translate itself into a monetary reward sometime later.

[47] Without any rebuttal from the defendant, there can only be one conclusion to the plaintiff's assertions — ie that the JR application was indeed intended for a political mileage to benefit the defendant's party in the 14th General Election. I therefore hold that this is an appropriate case for the court to grant exemplary damages in favour of the plaintiff.

Aggravated damages

[48] The learned author, Norchaya Taib in her book, *Law of Torts in Malaysia* (3rd Ed) at p 462 said:

> Aggravated damages are awarded when the plaintiff has suffered injury or loss other than pecuniary loss, such smear on his reputation, feeling of pain and so forth. Aggravated damages may be awarded for malicious falsehood. In awarding aggravated damages the court will take into account the Defendant's conduct and his motive when the tort was committed. Aggravated damages may be awarded in addition to general damages.

[49] Zawawi Salleh JCA (as he then was) in *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784 termed aggravated damages as 'a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where the injury has been caused or exacerbated by the exceptional conduct of the defendant'.

[50] It had been averred in the affidavit (encl 23) that the defendant's conduct in filing the JR application and statement and causing them to be published in the newspapers before the 14th General Election had caused the plaintiff humiliation and anxiety. This was not challenged by the defendant at all.

[51] Of further significance is the fact that despite the plaintiff's present action and despite having no real defence to the action (thus, the judgment in default of defence), there was no evidence that the defendant attempted to or did tender an apology. On the contrary, the defendant had proceeded to oppose the assessment of damages. On this point, what was stated by *Gatley on Libel & Slander* (9th Ed) at p 826 is relevant:

> However, the defendant is not confined to evidence of malice when seeking aggravated damages ... It has been doubted whether mere failure to make an apology can ever justify aggravation of damages. But the weight of recent authority is to the effect that the absence of an apology can, depending on the facts of the case, increase injury to feelings.

[52] Given the above, I take the view that likewise, the plaintiff is entitled to claim for aggravated damages.

Damages awarded

[53] As noted earlier, the plaintiff had sought for damages in the sum of RM1.3m comprising of RM300,000, RM500,000 and RM500,000 as general damages, exemplary damages and aggravated damages respectively.

[54] On this contention, I am mindful of what Gopal Sri Ram JCA (as he then was) had said in *Choon @ Chin Tee Fut v Chua Jui Meng* that runaway damages are to be discouraged as follows:

> There is one matter of some importance that this case has raised. It appears to be the respondent's argument that separate awards for aggravated and exemplary damages should be made. That is what the High Court did. With respect, we disagree with this approach. For many years it was thought that in all cases of tort global awards should be made, including in claims for personal injuries. However, only in respect of claims for personal injuries, when the courts started awarding interest at different rates on the different heads of damages, it became necessary for courts to make

separate awards for pain and suffering and loss of amenities, actual loss of income, future loss and special damages. But in defamation cases it is never the practice to award interest on each separate head of damages. Interest is merely granted on the single award. In our judgment, we should, in defamation cases, maintain the age-old practice of making a global award in order to limit the size of awards. Otherwise we will have runaway damages once again. The speech of Lord Hailsham in *Cassell v Broome* appears to fairly support the view we take of the matter.

[55] In arriving at my decision, guided by what the court in *Chong Siew Chiang v Chua Ching Geh & Anor,* said ie that the court is entitled to consider the amount of previous cases, I had also considered the amount of damages awarded by the courts in cases involving politicians such as those which were brought to the attention of the Federal Court in *Datuk Harris Mohd Salleh v Datuk Yong Teck Lee (sued in his personal capacity and as an officer of the second respondent) & Anor* [2017] 6 MLJ 133; [2017] 6 MLRA 281. These include:

(a) *Dato' Ahmad Rejal Arbee & Anor v YB Mahfuz Omar* [2015] 3 MLRA 529 involving defamation against politician but the Court of Appeal only granted RM110,000;

(b) *Chin Choon v Chua Jui Meng*. The Court of Appeal only allowed an award of RM200,000 by way of global award of damages and reversed the High Court decision in granting RM1.5m previously as damages;

(c) *Dato' Musa Hitam v SH Alattas & Ors*. The court only granted RM100,000 as damages for defamation;

(d) *YB Dato' Dr Hasan bin Mohamed Ali lwn YB Mulia Tengku Putra bin Tengku Awang dan lain-lain* [2010] 8 MLJ 269; [2009] 4 MLRH 421. The court only granted the sum of RM50,000 despite the fact that the plaintiff was an Exco (politician);

(e) *Chong Siew Chiang v Ng Kim Ho and Anor* [2010] MLJU 639; [2011] 1 MLRH 188. The court awarded RM100,000 against the first defendant and RM50,000 against the second defendant;

(f) *Dato' Dr Tan Chee Khuan v Chin Choong Seng @ Victor Chin* [2011] 8 MLJ 608; [2010] 3 MLRH 723. The court only allowed the sum of RM150,000 as damages for libel;

(g) *Datuk Harris Mohd Salleh v Datuk Mohd Shafie Hj Apdal & Ors* [2009] 7 MLJ 371; [2008] 3 MLRH 527. The court decided to award RM50,000 only as damages to the plaintiff against the second to the fifth defendants despite the plaintiff's claim of RM43m;

(h) *Datuk Harris bin Mohamed Salleh v Abdul Jalil bin Ahmad & Anor* [1984] 1 MLJ 97; [1983] 1 MLRH 92. At the material time, the plaintiff was still the then Chief Ministry of Sabah but the court only allowed RM100,000 in damages to the plaintiff;

(i) *Lim Guan Eng v Utusan Melayu (M) Bhd* [2012] 2 MLJ 394; [2012] 3 MLRH 124. The above mentioned involved a politician and also the Chief Minister of Penang. The court decided to award RM200,000 as general and aggravated damages and costs of RM25,000 only; and

(j) *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492; [2009] 4 MLRH 48. The plaintiff claimed for RM100m. It was held by the court that 'the claim of RM100m was a gross exaggeration'. A sum of RM100,000 as compensatory damages was awarded.

[56] In the present case, based on the undisputed or unchallenged averments of the plaintiff, I am satisfied that the requirements for the grant of general damages, aggravated damages and exemplary damages are fulfilled. Here, the defendant clearly intended to gain political mileage by the JR application. In so doing, the defendant was not beyond destroying the reputation and good name of the plaintiff by making the allegations public without any justification.

[57] Therefore, taking all that into account, I grant a global sum of RM300,000 to the plaintiff to be paid by the defendant with statutory interest of 5%pa from the date hereof to the date of full settlement and costs subject to payment of allocatur fees.

The court granted RM300,000 in damages and costs subject to payment of allocatur fees.

Reported by Izzat Fauzan